Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

NO. 80-226

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

EDWARD CHARLES JACKSON, PETITIONER
VS.
THE STATE OF LOUISIANA, RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a defendant be convicted of aggravated rape which has a mandatory sentence of life imprisonment without benefit of probation, parole or suspension of sentence by a nonunanimous verdict of a twelve-member jury?

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78,26 L. Ed. 2d 446,90
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REFERENCE TO REPORT OF OPINION OF LOUISIANA SUPREME COURT

In a per curiam opinion, the Louisiana Supreme Court affirmed the trial court's decision and, subsequently, denied a rehearing. State v. Jackson, 383 So. 2d 781 (La. 1980).

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Louisiana Supreme Court decision in question was rendered April 16, 1980, and the rehearing was denied on May 19, 1980. 28 U.S. C.A. Sec. 1257(3) confers, upon this Court, jurisdiction to review said decision by writ of certiorari.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The Sixth Amendment to the United States

Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 17 of the Louisiana Constitution provides:

"A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement

without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have the right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury."

Article 782(A) of the Louisiana Code of Criminal procedure provides:

"Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which punishment is necessarily confinement as hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Cases in which the

punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict."

LSA - R.S. 14:42 provides:

"Aggravated rape is a rape committed where the anal or vaginal sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

1) Where the victim resists the act to the utmost, but whose resistance is overcome by force; or

2) Where the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution; or

3) Where the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.

"Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation or suspension of sentence."

STATEMENT OF CASE WITH FACTS MATERIAL TO QUESTION PRESENTED

Edward Charles Jackson allegedly entered a dormitory suite at Northeast Louisiana University, Monroe, Louisiana, and committed two counts of aggravated rape and one count of aggravated burglary while in said suite. The defense, prior to submission of the case to the jury, indicated that the decision of the jury should be unanimous and objected to the trial judge charging the jury that a conviction would require an affirmative vote of ten of the twelve

jurors. Said objection was overruled by the trial court and the jury rendered a guilty verdict on each of the three counts by a vote of eleven to one. One juror voted for acquittal on the aggravated rape charges and another juror voted for acquittal on the aggravated burglary charges. The Louisiana Supreme Court affirmed the decision of the trial court in a per curiam decision.

The objection to the trial judge's charge to the jury was made prior to the submission of the case to the jury for deliberation and said objection and the accompanying argument is shown at Page 385, lines 1-31 of the trial court transcript. The question, which is now before this Court, was discussed under Assignment of Error No. 1 on appeal to the Louisiana Supreme Court.

ARGUMENT FOR ALLOWANCE OF WRIT

The applicable Louisiana law would appear to be Article 1, Section 17, of the Louisiana Constitution and Article 782 of the Louisiana Code of Criminal Procedure. Each of these articles provides that cases in which the punishment may be capital shall be tried by a jury of twelve persons, all of whom must concur to render a verdict. At the same time, said articles provide that cases in which the punishment is necessarily confinement at hard labor, i.e., confinement in a state penitentiary, shall be tried by a jury of twelve persons, only ten of whom must concur to render a verdict. LSA-R.S. 14:42 provides that punishment for the crime of aggravated rape shall be life imprisonment without benefit of parole, probation or suspension of sentence.

It is contended that this mandatory sentence is of a nature which should require a unanimous verdict of the twelve member jury under the provisions of the Sixth and Fourteenth Amendments to the United States Constitution.

The majority of this Court in a five-to-four decision in Johnson v. Louisiana, 406 U.S. 356,32 L. Ed.2d 152 (1972), held that a nine-to-three vote for conviction by a twelve-man jury was sufficient to convict a defendant on a charge of robbery. The applicable law, i.e., Article 782 of the Louisiana Code of Criminal Procedure, was subsequently amended to provide for the presently-required vote of ten of the twelve jurors. It was noted that Louisiana "permitted less serious crimes to be tried by five (now six) jurors with unanimous verdicts, more serious crimes have required

the assent of nine (now ten) of 12 jurors, and for the most serious crimes a unanimous verdict of 12 jurors is stipulated... To obtain a conviction in any of the categories under Louisiana law, the State must prove guilt beyond a reasonable doubt, but the number of jurors who must be so convinced increases with the seriousness of the crime and the severity of the punishment that may be imposed". Johnson, supra at 32 L. Ed. 2d 160.

In a recent case, Burch v. Louisiana, 441 U.S. 130, 60 L. Ed. 2d 96 (1979), the United States Supreme Court held that a non-unanimous decision by a six-member jury was unconstitutional under the Sixth and Fourteenth Amendments of the United States Constitution. Citing the case of Williams v. Florida, 399 U.S. 78,26 L. Ed.

2d 446 (1970), the Court noted that "there is 'little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers twelve -- particularly if the requirement of unanimity is retained.'" 60 L. Ed. 2d at 102. The Court in Burch noted that it had previously decided that juries of less than twelve member, but at least six, were constitutional and that the use of non-unanimous verdicts were approved in certain cases involving twelve-member juries. The Court then said:

> "...(T)his case lies at the intersections of our decisions concerning jury size and unanimity. As in Ballew (v. Georgia, 435 U.S. 223,55 L. Ed. 2d 234,98 Ct. 1029 (1978)), we do not pretend the ability to discern a priori a bright line below which the number of jurors participating in the trial or in in the verdict would not permit

> the jury to function in the manner required by our prior cases. (citations omitted) But having already departed from the strictly historical requirements of jury trial, it is inevitable that lines must be drawn somewhere if the substance of the jury trial is to be preserved..." 60 L. Ed. 2d at 103.

Of course, the Burch case involved the question of unanimity for a six-member jury and the Court therein specified that it intimated "no view as to the constitutionality of non-unanimous verdicts rendered by juries comprised of more than six members". 60 L. Ed. 2d at 104, F.N. 11. Petitioner contends that the present case presents an "intersection" wherein the question of unanimity must be specifically decided by this Court.

The punishment for aggravated rape in the State of Louisiana was the death penalty

under L.R.S. 14:42 until the United States Supreme Court ruled such penalty to be unconstitutional for said crime in Coker v. Georgia, 433 U.S. 584,53 L. Ed. 2d 982 (1977). The Louisiana Legislature amended the statute in question in 1978 to provide for a life sentence without benefit of probation, parole or suspension of sentence. Under the prior version of L.R.S. 14:42, a unanimous decision by the twelve-member jury would have been required. The facts which are required to find a defendant guilty of aggravated rape were not changed by the recent statutory amendment. This Court might apply the reasoning that the question of unanimity should be decided on the basis of whether the punishment is capital; however, the contention herein is that such distinction is not satisfactory. While the appellate court

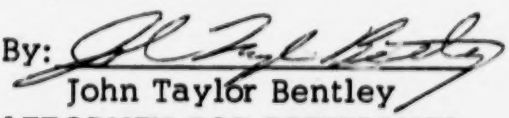
in Moore v. Cowan, 560 F. 2d 1298 (6th Cir. 1977), held such "life without hope" argument to be lacking since the possibilities of communication or pardon existed, it should be noted that the rape conviction therein did not require a life sentence without parole as a mandatory punishment. Under the Louisiana statute in question, the punishment of a life sentence without benefit of probation, parole or suspension of sentence is mandatory. Based upon the seriousness of the crime and the severity of the imprisonment which must be imposed, it is argued that a unanimous decision should have been required of the twelve-member jury.

Therefore, petitioner contends that the trial court's decision in the present case and the Louisiana Supreme Court's affirmation

of same are unconstitutional under the Sixth and Fourteenth Amendments of the United States Constitution and, therefore, this petition for writ of certiorari should be granted to consider this issue.

Respectfully submitted,

WHITE & BENTLEY

By: 
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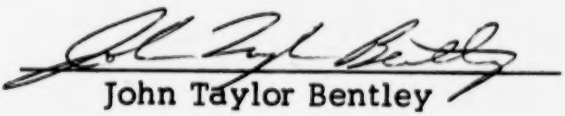
CERTIFICATE FOR SERVICE

I hereby certify that three copies of the foregoing petition for writ of certiorari were sent to William J. Guste, Jr., Attorney General, State of Louisiana, through Barbara B. Rutledge, Assistant Attorney General, Louisiana Supreme Court Building, New Orleans, Louisiana 70112, and Johnny C. Parkerson, District Attorney for Fourth Judicial District, Ouachita Parish, Louisiana, through John R. Harrison, Assistant District Attorney, P. O. Box 1652, Monroe, Louisiana 71201, on this 13th day of August,

1980, in compliance with Rule 28.3 & 28.5(b) of the Supreme Court of the United States.



John Taylor Bentley

APPENDIX

APR 16 1980

SUPREME COURT OF LOUISIANA

NO. 66,084

STATE OF LOUISIANA

V.

EDWARD CHARLES JACKSON

Appeal from the 4th Judicial District Court,
Parish of Ouachita,
Honorable Lemmie O. Hightower, Judge.

PER CURIAM.

Affirmed.

delaHoussaye, J. ad hoc, does not participate.

EXHIBIT "A"

Supreme Court of Louisiana

NEW ORLEANS, 70112

NEWS RELEASE #55

FOR IMMEDIATE NEWS RELEASE

On the 19th day of May, 1980, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARING GRANTED:

64,786 State v. Renee Morris

REHEARINGS DENIED:

...

66,084 State v. Edward Charles Jackson

....

EXHIBIT "B"

Supreme Court, U. S.
FILED
OCT 31 1980
MICHAEL RODAK, JR., CLERK

NO. 80-226

In the Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD CHARLES JACKSON,
Defendant-Petitioner

VERSUS

STATE OF LOUISIANA
Plaintiff-Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF LOUISIANA

RESPONSE IN OPPOSITION TO WRIT OF CERTIORARI

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C.F. Williams v. Florida, supra, at 99-100, 90 S.Ct., at 1905 3

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 80-226

EDWARD CHARLES JACKSON
Defendant-Petitioner

VERSUS

STATE OF LOUISIANA
Plaintiff-Respondent

REPLY BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

The State of Louisiana, plaintiff-respondent herein, prays that this court deny the issuance of a Writ of Certiorari to review the judgment and decision of the Supreme Court of the State of Louisiana affirming the convictions of Edward Charles Jackson for two counts of aggravated rape and one count of aggravated burglary in the Fourth Judicial District Court, Ouachita Parish, Louisiana.

JURISDICTION

Plaintiff-respondent states that the question presented by petitioner does not invoke the jurisdiction of this Court for the reasons hereinafter set forth.

REASONS FOR DENIAL OF THE WRIT

Petitioner questions the constitutional validity of a non-unanimous jury verdict in regard to his convictions of two counts of aggravated rape and one count of aggravated burglary. One juror voted for acquittal on the aggravated rape counts and another juror voted for acquittal on the aggravated burglary count, thus resulting in a 11-1 vote on each offense.

In *Johnson v. Louisiana,* 406 U.S. 356, 92 S.Ct. 1635, 32 L. Ed. 2d 152 (1972), this court held a conviction by a vote of nine of twelve jurors did not deprive the defendant of his constitutionally guaranteed right to trial by jury. At that time, the Louisiana Constitution and statutes permitted convictions or acquittals by votes of at least nine members of the jury in criminal cases where the punishment was necessarily at hard labor. Subsequent to the decision in the *Johnson* case, a new Louisiana Constitution was adopted which required the concurrence of at least ten members of the jury in order to return a verdict in these cases. Article 1, Section 17 of the Louisiana Constitution of 1974 provides:

> "A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor

> shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. . . ."

Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L.Ed. 2d 184 (1972), was decided concurrently with the decision in the Johnson case, and upheld an Oregon statute which permitted 10-2 jury verdicts in some criminal cases. The court said:

> "Our inquiry must focus upon the function served by the jury in contemporary society. *Cf. Williams v. Florida, supra*, at 99-100, 90 S.Ct., at 1905. As we said in Duncan, the purpose of trial by jury is to prevent oppression by the Government by providing a "safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S., at 156, 88 S.Ct. , at 1451. "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commensense judgment of a group of laymen . . ." *Williams v. Florida, supra*, 399 U.S., at 100, 90 S.Ct., at 1906. A requirement of unanimity, however, does not materially contribute to the exercise of this commonsense judgment. As we said in *Williams*, a jury will come to such a judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt. In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or

> 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served."

Petitioner argues the decision in *Burch v. Louisiana*, 441 U.S. 130, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979), lends support to his position. *Burch* struck down Louisiana constitutional and statutory provisions allowing less than unanimous verdicts in cases where the traditional twelve member jury was reduced to six members. The court stated:

> "However, much the same reasons that led us in Ballew to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude now that conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six person juries to be unanimous. We are buttressed in this view by the current jury practices of the several States. It appears that of those States that utilize six-member juries in trials of nonpetty offenses, only two, including Louisiana also allow nonuninanimous verdicts. We think

> that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." Authorities omitted.

It is submitted that the reasoning in *Burch* was limited to the problem at issue, and was not meant to indicate a re-examination of the issues decided by *Johnson and Apodaca.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Honorable Supreme Court of the United States should deny the Petition for Writ of Certiorari filed herein.

RESPECTFULLY SUBMITTED,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

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BY: _____
JOHN R. HARRISON

CERTIFICATE

It hereby is certified that a copy of the foregoing Response was this day served upon Mr. John Taylor Bentley, Attorney for Defendant, 115 North Franklin Street, Bastrop, Louisiana, 71220, by depositing same in the United States mail, postage prepaid.

MONROE, LOUISIANA, this 30th day of October, 1980.

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